IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 13 of 2003

in

COMPANY PETITION No 53 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S.BHAVESH ENTERPRISES

Versus

O.L.F OF YAMUNA MILLS LTD.

Appearance:

1. COMPANY APPLICATION No. 13 of 2003

MR AJAY R MEHTA for Petitioner No. 1

OFFICIAL LIQUIDATOR for Respondent No. 1

DR SONIA HURRA for Respondent No. 2

MR RM DESAI for Respondent No. 3

MR DS VASAVADA for Respondent No. 4

CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 20/03/2003

ORAL JUDGEMENT

Rule. Service of rule is waived by the concerned learned advocates appearing for the opponents. At the request of the learned advocates and the Official Liquidator the application is finally heard today.

2. The facts giving rise to this application in a nutshell are as under :-

2.1. The applicant, a partnership firm, being desirous of purchasing a building belonging to Yamuna Mills Co. Ltd., (in Liquidation and hereinafter referred to as "the Company") had submitted its offer to the Official Liquidator in pursuance of an advertisement dated 01.02.2002. As per the terms and conditions incorporated in the advertisement issued by the Official Liquidator, the applicant firm had deposited a sum of Rs.5 Lakhs on 19.02.2002 with the Official Liquidator.

3. The Official Liquidator had opened the sealed envelopes containing offers received by him from the applicant as well as other offerors on 22.02.2002.

3.1. The applicant had offered to purchase the assets in question for a sum of Rs.55,00,666/-. The Official Liquidator was of the view that the offer which he had received from the applicant as well as other offerors were not adequate and according to him it was possible to sell the assets in question at a higher price. In the circumstances, he had invited all the offerors to his office so as to have an inter-se bidding on 22.02.2002.

4. At the time of inter-se bidding, the applicant had raised its offer to Rs.95 Lakhs and the said offer was the highest. However, the Official Liquidator had informed the applicant's representative that as per the terms on which the building was being offered for sale, the final order with regard to confirmation of sale was to be passed by the High Court, and the applicant would be informed as and when the sale would be confirmed by the High Court. As per the case of the applicant, the applicant was not informed about any development in the matter though several inquiries were made and ultimately the applicant withdrew its offer.

5. In the above set of circumstances, the applicant has approached this Court with a prayer that the Earnest Money deposited by it be returned to it.

6. In pursuance of notice issued by this Court, the Official Liquidator, learned advocate Dr.Sonia Hurra learned advocate Shri R.M. Desai and learned advocate Shri D.S. Vasavada have appeared for respondents nos.1 to 4 respectively. Respondents nos.2 and 3 are the secured creditors of the Company, whereas respondent no.4 is a Union of workmen of the Company.

7. Learned advocate Shri Ajay Mehta appearing for the applicant has submitted that though the offer given by the applicant was the highest, the offer had not been accepted by the Official Liquidator or by this Court within a reasonable period and, therefore, the applicant had withdrawn the offer before he was communicated the acceptance of the offer and, therefore, the applicant must be returned the amount of EMD, which he had given alongwith his offer to the Official Liquidator on 19.02.2002.

8. According to the case of the applicant firm, as the applicant did not hear anything with regard to the confirmation of the sale or otherwise from the Official Liquidator, the applicant made certain inquiries, but no specific answer to the inquiry was given by the Official Liquidator. Looking to the fact that for a considerably long period no final reply was given to the applicant with regard to confirmation of the sale or otherwise by the Official Liquidator, the applicant had addressed a letter dated 14.08.2002 informing the Official Liquidator that the applicant was not interested in purchasing the assets and the applicant had withdrawn the offer by the said communication.

9. In the meantime, the Official Liquidator had approached this Court by filing his report no.17/2002 praying for an order for confirmation of sale in favour of the applicant. This Court was pleased to pass an order dated 2.08.2002 whereby sale in favour of the applicant had been confirmed.

10. As the applicant had already communicated to the Official Liquidator that the applicant was not interested in purchasing the assets in question, the applicant wanted the amount of EMD to be returned to it and, therefore, the applicant requested the Official Liquidator to return the amount of deposit.

11. The Official Liquidator did not return the said amount as, according to him, the sale in favour of the applicant had already been confirmed and, therefore, the

EMD was not to be returned. On the contrary, according to the Official Liquidator, the applicant had to make payment of the balance amount so as to have the possession of the assets in question. Thus, the applicant was not given back the amount deposited by it with the Official Liquidator.

12. Intimation of confirmation of the sale was sent to the applicant after 14.08.2002, the day on which the applicant had intimated to the Official Liquidator that the applicant was not interested in buying the property and by virtue of the said letter the offer had been withdrawn by the applicant.

13. Learned advocate appearing for the applicant has also submitted that the applicant was not a party to the proceedings in which the sale in favour of the applicant was confirmed. Had the applicant been informed about the proceedings which had been initiated by the Official Liquidator by filing report no.17/2002, the applicant would have submitted before this Court that on account of the delay caused by the Official Liquidator, the applicant had already withdrawn the offer. As the order of this Court confirming the sale was passed without hearing the applicant, according to the learned advocate, the said order, confirming the sale would not bind the applicant especially when the offer had already been withdrawn by the applicant.

14. It has been also submitted by him that the Official Liquidator subsequently received another composite offer for Rs.5.30 Crores for sale of the building as well as the land and as the said offer had already been accepted by the Official Liquidator, the Official Liquidator had not suffered any loss even on account of withdrawal of the offer by the applicant.

15. In the circumstances, it has been submitted by the learned advocate that the Official Liquidator should be directed to return the EMD to the applicant immediately. It has been mainly submitted by him that it was not proper on the part of the Official Liquidator to keep the applicant offeror waiting for more than six months after the inter-se bidding had taken place and due to inaction on the part of the Official Liquidator, the applicant was inclined to believe that the Official Liquidator was not interested in accepting the offer of the applicant and, therefore, the applicant had withdrawn the offer.

16. On the other hand, learned advocate Shri R.M.

Desai for the Secured Creditors has submitted that the amount of EMD should not be returned to the applicant because the applicant did not communicate its intention to withdraw the offer to the Official Liquidator well in time. According to him, this Court had confirmed the sale in favour of the applicant on 02.08.2002 whereas, the applicant had written a letter on 14.08.2002 to the Official Liquidator stating that the offer given by the applicant was withdrawn. According to him, only upon knowing the fact that the offer had been accepted, the applicant had changed its mind and had addressed the letter dated 14.08.2002 to the Official Liquidator.

17. Learned advocate Shri Desai has also submitted that the report which was submitted by the Official Liquidator for getting the sale confirmed could not be heard immediately because of some other proceedings initiated by Sahajanand Cotton Trading Company, who had claimed some right in respect of some assets of the Company. It has been, therefore, submitted by learned advocate Shri Desai that there was no deliberate delay on the part of the Official Liquidator or this Court in confirming the sale in favour of the applicant. It has been also submitted by him that the applicant ought to have filed an application for getting himself joined in the proceeding which were pending before this Court so as to enable the applicant to make its submissions before this Court.

18. The Official Liquidator who has personally represented his case has submitted that there was no delay on his part and he had sent a letter dated 24.07.2002 to the applicant on the subject matter of the offer but he has fairly submitted that the said letter could not be served upon the applicant and the letter had been returned to the Official Liquidator with a postal remark of "incomplete address". He has also admitted the fact that the letter dated 14.08.2002 written by the applicant was received by him before he had communicated order of this Court whereby the sale was confirmed.

19. It has been also submitted by the Official Liquidator that according to the terms and conditions on which the assets were to be sold, it was very clear that the offer once submitted to the Official Liquidator was not to be withdrawn. He has drawn my attention to the said condition. Relying upon the said term, the Official Liquidator has submitted that it was not open to the applicant to withdraw the offer and as the applicant did not purchase the assets in question, the amount of EMD cannot be claimed by the applicant.

20. I have heard the learned advocates and have also considered the relevant terms and conditions on which the offer was made and the order passed by this Court.

21. According to condition no.26 incorporated in the document of offer, which is not on the record of this Court, it was not open to the applicant to withdraw the offer at any stage. The Official Liquidator has mainly relied upon the said condition so as to substantiate his submission that the offer, once made by the applicant, could not have been withdrawn and, therefore, the applicant should not be given back the amount of EMD, because the applicant had committed breach of the said condition. According to him, withdrawal of the offer was not permissible and, therefore, upon sale being confirmed by this Court it was obligatory on the part of the applicant to honour the contract and pay the balance amount of consideration.

22. It is true that the condition no.26 stipulates that the offer once made cannot be withdrawn by the offeror.

23. Here is the case where standard form has been given to the offeror before he was to submit his offer. The conditions incorporated in the form were binding upon the offeror - applicant. In the circumstances, ordinarily, one would come to a conclusion that it was not open to the offeror to withdraw the offer.

24. It is pertinent to note that the offer could not have been withdrawn by the applicant if the Official Liquidator had accepted the same within reasonable period. If the Official Liquidator keeps the offer pending without giving any intimation to the offeror for any reason and if the offer is not accepted within reasonable period of time, the offeror cannot be constrained to wait for unreasonably long period and in such an event the offeror can be permitted to withdraw the offer after reasonable period.

25. The terms and conditions incorporated in a standard form contract must be interpreted in a reasonable manner. In the instant case, the restrictions imposed upon the applicant with regard to non-withdrawal of the offer must be considered in the light of the fact that for a period exceeding six months, the Official Liquidator could not get the offer accepted. Prima facie it appears that the applicant had made inquiries with regard to confirmation of the sale or otherwise but no

definite answer was given to the applicant. In such a case, one cannot expect an offeror to wait for ever to get his offer accepted. One has to interpret the condition in a reasonable manner. In such a case, the restrictive condition cannot be interpreted in a manner that even if unreasonable delay is caused by the Official Liquidator, the applicant offeror should be constrained to keep his offer alive.

26. In my opinion, the applicant cannot be constrained to wait for ever and looking to the facts of the case, the Official Liquidator ought to have done the needful for getting the offer accepted with due promptness, but the offer was not accepted or no order with regard to the confirmation of sale was passed by this Court till 02.08.2002. It is irrelevant whether the Official Liquidator was busy or this Court could not take up the report for hearing for any reason. The fact remains that for a long period of six months nothing was done in pursuance of the offer and, therefore, there was unreasonable delay on the part of the Official Liquidator. The Official Liquidator cannot be permitted to take undue advantage of the delay which was definitely not caused on account of any fault of the applicant.

27. As there was no fault on the part of the applicant, and as the delay of more than six months was caused in getting the offer accepted, the applicant cannot be asked to suffer loss of Rs.Five Lakhs which he had deposited by way of EMD. It is a coincident that the applicant ultimately wrote a letter dated 14.08.2002 when this Court had already passed an order. It is however, not in dispute that the applicant was not informed about confirmation of the sale either by this Court or by the Official Liquidator before letter dated 14.08.2002 was written by the applicant. In the instant case, the communication with regard to acceptance of the offer had not been completed on 14.08.2002, when the applicant had written a letter to the Official Liquidator giving intimation with regard to the withdrawal of his offer.

28. Looking to the facts of the case, the Official Liquidator cannot be permitted to retain the amount of EMD as unreasonable delay was caused in accepting the offer and there was no fault on the part of the applicant. In view of the said fact the condition regarding non-withdrawal of the offer would not help the Official Liquidator. It is directed that the amount of EMD should be returned to the applicant on or before 28th March, 2003.

In the circumstances, the application stands disposed of as allowed. Rule is made absolute with no order as to costs.

[A.R. DAVE, J.]

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